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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

October 20, 2004 (4:34PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Lester S. Rubenstein

In the Matter of
ENTERGY NUCLEAR VERMONT YANKEE L.L.C.
and
ENTERGY NUCLEAR OPERATIONS, INC.
(Vermont Yankee Nuclear Power Station)

Docket No. 50-271-OLA

ASLBP No. 04-832-02-OLA

October 20, 2004

NEW ENGLAND COALITION'S
MOTION TO DISMISS PROCEEDING
DUE TO FAILURE TO PROVIDE PROPER NOTICE

New England Coalition, by and through its attorney, Jonathan M. Block, hereby moves to dismiss the above referenced proceeding due to the United States Nuclear Regulatory Commission's failure to provide adequate notice of the proceeding. Petitioner, New England Coalition, contends that the notice of hearing opportunity on the application in this case was issued before the application was complete. In fact, the application at issue is still being completed and is not likely to be complete until sometime in the spring of 2005.

As the application was not complete at the time the Notice of Hearing issued, the notice is defective and insufficient insofar as the subject matter of the notice, to wit, the *completed* application at issue, does not yet exist.

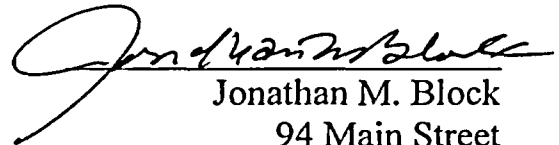
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SECY-02

In support of this motion, New England Coalition attaches a Memorandum of Facts and Law and the Declaration of Jonathan M. Block attached to the Memorandum of Facts and Law as Exhibit 'A'.

WHEREFORE, New England Coalition moves for dismissal and re-noticing of the availability of a hearing opportunity on the application within 60 days of such time when a completed application with all parts in a single docket file are available for public inspection, copying and review from the United States Nuclear Regulatory Commission's Public Document Room and/or ADAMS. A hearing on this motion is requested.

Respectfully submitted:

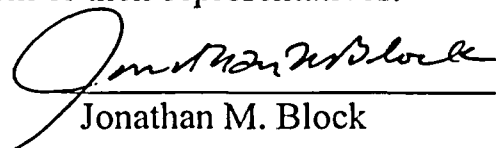


Jonathan M. Block
94 Main Street
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(802) 387-2646
<mailto:jonb@sover.net>

cc: Service List

CERTIFICATE OF SERVICE

On this 20th day of October, 2004, I, Jonathan M. Block, served upon the persons comprising the Service List in the above captioned case, an electronic copy of this and the within filing. I also certify that within 48 hours I will either mail a copy of this filing to the parties or hand it to them or their representatives.



Jonathan M. Block

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**NEW ENGLAND COALITION'S MEMORANDUM OF FACT AND LAW
SUPPORTING ITS MOTION TO DISMISS THE PROCEEDING
DUE TO FAILURE TO PROVIDE PROPER NOTICE**

New England Coalition, by and through its attorney, Jonathan M. Block, sets forth the following facts supported by an attached Declaration, attached hereto as Exhibit 'A':

1. The Notice of a hearing opportunity in this proceeding was issued on July 1.
2. The Notice states that the proceeding will be considering the license application submitted by the above captioned licensee entities.
3. The Notice plainly refers to the submission of a single application and states that the application is available for inspection and review at the Nuclear Regulatory Commission's Public Document Room electronically on ADAMS, the agency's computer document system.
4. Since the Notice of this proceeding, supplements to the application at issue have been added to the application.

5. The supplements now total at least twenty (20).

6. Of the 20 supplements, only supplements one (1) through thirteen (13) and fifteen (15) were available for public inspection as of October 18th. Supplement 16 was made publicly available on October 19th (yesterday).

7. The bibliographic information available for all of the supplements to the license application to date (October 20, 2004) show that the document issue date differs from the date each document is placed into the public document room on ADAMS (i.e., "relerased" to the public).

8. Examination of the supplements added to the license since the Notice of Hearing in this case reveal that a large transformation of the original license application has taken place since the Notice of Hearing was published in the Federal Register.

9. The NRC Staff has indicated to the applicant in this case that it will not likely be completed reviewing the expanded (and continually expanding) application "at least several months" beyond the "forecast completion date of January 31, 2005". Ledyard B. Marsh, Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation, to Michael Kansler, President, Entergy Nuclear Operations, Inc., at 2 (October 15, 2004). (available on ADAMS).

MEMORANDUM OF LAW

Re-alleging the above facts herein by reference, it is plain that the notice of hearing opportunity on the application in this case was issued before the application was complete. From the volume of material added to the application since the hearing notice was published, it is also plain that the application at issue is still being completed and is

not likely to be complete until sometime in the spring of 2005. Thus, the notice in this case of a hearing on the license application was defective. Reasonable notice, in this case, should be notice that can be understood by persons of average intelligence whose interests may be affected by the NRC's actions. Such persons need to be plainly and directly informed about the subject matter of the license amendment at issue. This is a requirement of "notice" that has long been the cornerstone of the minimum due process requirements of "notice" and an opportunity to be heard.

The Board has no power to adjudicate matters outside those set forth in the notice of hearing for a proceeding. *Portland General Electric Company* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287,289-290 n.6 (1979); *Public Service Company of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-171 (1976). *See also Commonwealth Edison Company* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); *Northern Indiana Public Service Company* (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); *Tulsa Gamma Ray, Inc.*, LBP-90-42, 32 NRC 387, 388 (1990). In this case, because the Notice referred only to the portions of the application referenced in the notice, the Board would only have authority to adjudicate those portions of the application--which, it is plain--are not the complete application.

A notice of hearing, moreover, cannot confer upon or broaden an agency's jurisdiction. Notice must correspond to the agency's statutory authority over a given matter, and cannot confer upon it authority to do what is expressly proscribed by law. *Florida Power and Light Co.* (St. Lucie Plant, Unit No. 2), ALAB-661, 14 NRC

1117,1123(1981). The agency cannot have authority under the Atomic Energy Act to adjudicate a matter that does not exist at the time it issues notice of the availability of hearing on that matter. This describes the situation in the case at bar.

The bottom line is that "Notice" provided by the government must be "reasonably certain to inform those affected" of the nature of the proceeding and their right to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). The notice in this case does not achieve this purpose because the application was not (and is not yet) complete. As the application was not complete at the time the Notice of Hearing issued, the notice was and is defective and insufficient insofar as the subject matter of the notice, to wit, the *completed* application at issue, does not yet exist.

CONCLUSION

New England Coalition asks the Board to dismiss and re-notice the availability of a hearing opportunity on the application within 60 days of such time when a completed application with all parts in a single docket file are available for public inspection, copying and review from the United States Nuclear Regulatory Commission's Public Document Room and/or ADAMS.

Respectfully submitted:



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cc: Service List

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Lester S. Rubenstein

In the Matter of
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Docket No. 50-271-OLA

ASLBP No. 04-832-02-OLA

October 20, 2004

DECLARATION OF JONATHAN M. BLOCK

I, Jonathan M. Block, declare as follows:

1. My name is Jonathan M. Block. I am counsel for New England Coalition in the above captioned matter.
2. I have reviewed the facts set forth in numbered section of New England Coalition's Memorandum of Facts and Law supporting its motion to dismiss and declare those facts to be true and correct.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 20, 2004.


Jonathan M. Block

New England Coalition Memorandum
Exhibit 'A'

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

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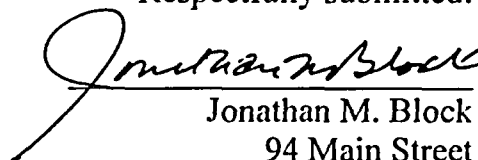
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NOTICE OF APPEARANCE

Pursuant to 10 CFR §2.314(b), Jonathan M. Block, Attorney at law, files notice of his appearance on behalf of the New England Coalition. Mr. Block is an attorney in private practice who is admitted to the Bar of the State of Vermont, the United States Supreme Court, the United Courts of Appeals for the District of Columbia, First, Second and Ninth Circuits, and the United States Federal District Court for the District of Vermont.

Respectfully submitted:



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ATOMIC SAFETY AND LICENSING BOARD**

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CERTIFICATE OF SERVICE

I hereby certify that copies of the within Notice of Appearance, Motion to Dismiss, Memorandum of Facts and Law, and Declaration were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, this 21th Day of October, 2004, or by handing copies to them or their representatives at the pre-hearing in Brattleboro, Vermont on October 21, 2004. Where indicated by an asterisk persons were also served by electronic mail on October 20, 2004.

*Administrative Judge
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Washington, D.C. 20555-0001
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*Administrative Judge
Dr. Anthony J. Baratta
Atomic Safety and Licensing Board Panel
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*Administrative Judge
Lester S. Rubenstein
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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

*Secretary
Att'n: Rulemakings and Adjudications Staff
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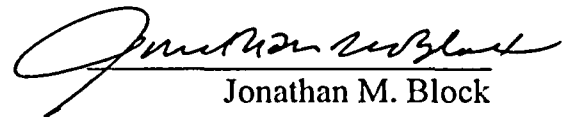
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October 20, 2004

Secretary
United States Nuclear Regulatory Commission
Washington, DC 20555-0001
ATT: Rulemakings and Adjudications Staff

RE:

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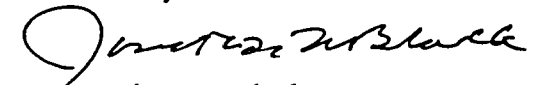
October 20, 2004

Dear Rulemakings and Adjudications Staff:

Enclosed for filing electronically please find New England Coalition's Motion to Dismiss with supporting Memorandum of Law and Declaration. The original and two copies will be mailed to your office within 48 hours. A notice of my appearance as counsel for New England Coalition was sent to you earlier today.

Thank you for your cooperation in this matter.

Sincerely,


Jonathan M. Block
Attorney for New England Coalition

cc: Service List (electronically)